

STATE OF MICHIGAN
IN THE SUPREME COURT

CZYMBOR'S INC.,
a Michigan corporation, and
MICHAEL CZYMBOR, an individual

Plaintiffs-Appellants,

vs.

CITY OF SAGINAW,
a municipal corporation, and
DEBORAH KIMBLE, City Manager,
jointly and severally,

Defendants-Appellees.

Supreme Court Case No. 130672

Court of Appeals Case No. 263505

Saginaw County Circuit Court
Case No. 03-050339-CH-3

BRIEF OF AMICUS CURIAE

THE MICHIGAN MUNICIPAL LEAGUE

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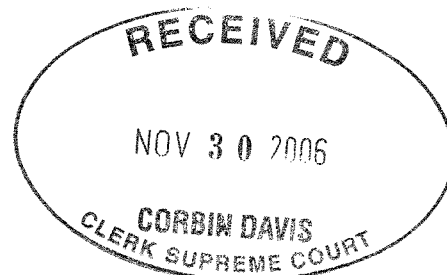


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF BASIS OF JURISDICTION	iii
STATEMENT OF QUESTIONS PRESENTED	iv
STATEMENT OF FACTS	v
DESCRIPTION OF THE AMICUS CURIAE	vi
INTRODUCTION	1
ARGUMENT	2
I THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT THE NREPA DOES NOT PRE-EMPT THE CITY’S EXERCISE OF ITS POLICE POWERS UNDER THE HOME RULE CITY ACT AND THE CITY CHARTER.....	2
A. The Legislature did not pre-empt local ordinances prohibiting the discharge of firearms and other weapons simply by enacting the “Hunting Area Control” chapter of the NREPA, but rather established an optional protocol for local governments seeking to regulate firearms discharge, which was not intended to eliminate local governments’ well-established authority to regulate firearms discharge	3
B. Because the ordinances regulating the discharge of firearms and other weapons are police power ordinances relating to the health, safety, and general welfare of citizens within the City, they are separate and distinct from hunting regulations	5
II THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT THE CITY OF SAGINAW ORDINANCES, BY REGULATING THE DISCHARGE OF FIREARMS, ARE A PROPER EXERCISE OF THE CITY’S POLICE POWERS UNDER THE HOME RULE CITY ACT AND THE CITY CHARTER	6
CONCLUSION AND RELIEF REQUESTED	8

TABLE OF AUTHORITIES

CASES

<i>Bay Co Concealed Weapons Licensing Bd v Gasta</i> , 96 Mich App 784, 293 NW2d 707 (1980).....	6
<i>Belle Isle Grill Corp v City of Detroit</i> , 256 Mich App 463, 666 NW2d 271 (2003).....	2
<i>Burt Twp v Dep't of Natural Resources</i> , 459 Mich. 659, 557 NW2d 289 (1999)	5
<i>Michigan Coalition for Responsible Gun Owners v City of Ferndale</i> , 256 Mich App 401, 662 N.W.2d 864 (2003)	6
<i>Michigan United Conservation Clubs v City of Cadillac</i> , 51 Mich App 299, 214 NW2d 736 (1974).....	5, 6
<i>People v Brown</i> , 253 Mich 537, 235 NW 245 (1931)	6
<i>People v Hurlbut</i> , 24 Mich 44 (1871).....	1
<i>People v Llewellyn</i> , 401 Mich 314, 257 NW2d 902 (1977)	3
<i>Pittsfield Charter Twp. v. Washtenaw County</i> , 468 Mich. 702, 664 NW2d 193 (2003).....	5
<i>Rental Property Owners Association of Kent County v City of Grant Rapids</i> , 455 Mich 246, 566 NW2d 514 (1997)	3, 4

STATUTES

MCL 117.1 <i>et seq.</i>	2
MCL 117.3	2
MCL 117.4j(3)	2
MCL 123.1102	6
MCL 324.41901	3

STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the brief of Defendant-Appellee City of Saginaw is correct and is adopted by the amicus curiae.

STATEMENT OF QUESTIONS PRESENTED

Were the City of Saginaw’s ordinances prohibiting the discharge of firearms and certain other weapons within the City act pre-empted by the “Hunting Area Control” provisions of Michigan’s Natural Resources and Environmental Protection Act ("NREPA")?

Defendant-Appellee would answer “No”

Plaintiffs-Appellants would answer “Yes”

The trial court answered “No”

The Court of Appeals answered “No”

Amicus curiae answers “No”

Did the City of Saginaw, by enacting ordinances prohibiting the discharge of firearms and certain other weapons within the City act within the authority granted to it under the Home Rule City Act?

Defendant-Appellee would answer “Yes”

Plaintiffs-Appellants would answer “No”

The trial court answered “Yes”

The Court of Appeals answered “Yes”

Amicus curiae answers “Yes”

STATEMENT OF FACTS

The amicus curiae Michigan Municipal League accepts the statement of facts asserted by the Defendant-Appellee City of Saginaw as complete and correct.

DESCRIPTION OF THE AMICUS CURIAE

The Michigan Municipal League

The Michigan Municipal League is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is to improve the quality of municipal government within the state by providing technical, educational, and administrative resources to the cities and villages that make up its membership, while increasing public awareness of the functions and needs of local governments in Michigan. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation that may affect the structure, operation, authority, or financial well-being of municipalities within the state.

INTRODUCTION

In the case at bar, this Court again is asked to decide a challenge to the longstanding legal principle of home rule. *Amicus curiae* propose that this case presents this Court with the opportunity to reinforce judicial recognition of the broad decision-making powers of cities by finding that the Hunting Area Control provisions of the NREPA provide cities with an alternative process by which to regulate firearm discharge and that to the extent that the State has the power to regulate firearm discharge, that power exists concurrently with cities' power to regulate the same under the Home Rule City Act

Emphasis on local control is as old as the State. In *People v Hurlbut*, 24 Mich 44 (1871), Justice Cooley declared:

The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless . . . imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

Id. at 74. As the State's system of government matured, home rule remained a core public policy concept. The Michigan Constitution of 1908 provided that each city and village would have the authority "to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state." Const 1908, art 8, § 21. The 1963 Constitution amplified the home rule language:

Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const 1963, art 7, § 22. The 1963 Constitutional Convention record recognized that "home rule cities and villages are guaranteed full power over their own property and government, *and these*

powers cannot be limited except by deliberate statement of intent by the legislature.” 1963 Constitutional Convention Comment, p. 1007 (emphasis supplied).

The Legislature codified home rule for cities in the Home Rule City Act, 1909 PA 279, as amended, MCL 117.1 *et seq.* Under the Home Rule City Act, a city charter may provide:

For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

MCL 117.4j(3). The City’s charter provides for the exercise of all powers provided under Michigan law, and therefore incorporates this section of the Home Rule City Act. Saginaw City Charter, Ch. 1 § 1. Beyond the general powers set forth above, home rule cities are more pointedly authorized, and in some cases required, to implement charter provisions and ordinances pertaining to police powers, i.e., the regulation of public health, safety and general welfare. *See* MCL 117.3; *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463; 666 NW2d 271 (2003); 6A McQuillin, Municipal Corporations (3d ed rev), § 24.35.

ARGUMENT

I THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT THE NREPA DOES NOT PRE-EMPT THE CITY’S EXERCISE OF ITS POLICE POWERS

Plaintiffs’ arguments rely on the concept of field pre-emption. That is, Plaintiffs contend (1) that the City’s ordinances constitute de facto hunting restrictions, and (2) that the State has created a legislative and regulatory that is so pervasive as to occupy the entire field of regulation in the area of hunting. As the trial court and the Court of Appeals held, both aspects of Plaintiffs’ position fail.

- A. The Legislature did not pre-empt local ordinances prohibiting the discharge of firearms and other weapons simply by enacting the “Hunting Area Control” chapter of the NREPA, but rather established an optional protocol for local governments seeking to regulate firearms discharge, which was not intended to eliminate local governments’ well-established authority to regulate firearms discharge.**

In order to establish that the Legislature intended to pre-empt cities from enacting firearm and weapons discharge ordinances, Plaintiffs must establish that the “Hunting Area Control” provisions of the NREPA are so pervasive that the Legislature intended to “occupy the field” of regulation to the exclusion of cities’ power to enact ordinances on the subject of weapons discharge, where such ordinances would affect hunting. *See People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977). Indeed, as Plaintiffs point out, the NREPA contains regulatory restrictions on hunting, and the Hunting Area Control provisions set forth a procedure by which a local unit of government may petition the Department of Natural Resources for closure of a defined area wherein hunting would be prohibited. MCL 324.41901.-.41905.

Given the typical lively debate between local units and the State on issues of pre-emption (no exception in this case), it may be tempting to characterize the State versus local unit question as an all-or-nothing proposition—either the State is the lawmaker and regulator or the local unit has control of the issue. The question is, however, not simply “either/or,” as the law recognizes it is the paradigm of concurrent power. The case at bar should be analyzed in this context. This Court was faced with the question of concurrent power in *Rental Property Owners Association of Kent County v City of Grand Rapids*, 455 Mich 246; 566 NW2d 514 (1997). *Grand Rapids* involved a challenge to the City of Grand Rapids nuisance abatement ordinance, which provided that the city commission could declare a property to be a public nuisance if often used for certain illicit activity, *id.* at 248-49, notwithstanding the existence of a State nuisance abatement statute, which has similar provisions, with a permissive State enforcement mechanism, not unlike

NREPA. *Id.* at 259-60.

Like the ordinances in the instant case, the nuisance abatement ordinance in *Grand Rapids* represented an exercise of the city's police power. *Id.* at 253-54. The *Grand Rapids* Court noted that ordinances exercising police powers are presumed to be constitutional and valid. *Id.* at 253 (citing *Austin v Older*, 283 Mich 667, 674; 278 NW 727 (1938); *Fass v Highland Park (on reh)*, 321 Mich 156; 32 NW2d 375 (1948)). On the substantive issue of pre-emption, the Court held:

The mere fact that the state . . . has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not . . . unreasonable or discriminatory, both will stand. . . . Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

Id. at 262.

The instant case resembles *Grand Rapids*. It involves a State statute that contains some level of regulation and enforcement of remedies and a local ordinance relating to the same subject, but with a wider proscriptive effect. As in *Grand Rapids*, the State statute is not so pervasive as to occupy the field (in this case, the field of firearm regulation). Rather the State statute provides one mechanism to reach a certain end—the prohibition of discharging certain weapons. The local ordinance provides an alternate mechanism to reach the same end.

Not only does the relationship between the City's ordinances and NREPA amount to concurrent authority between the local unit and the State, but it also represents concurrent *statutory* authority. There is no controversy that the Department of Natural Resources' powers

flow directly from NREPA, but it is easy to overlook, as Plaintiffs have, the reality that the City's powers flow directly from the Home Rule City Act—indeed the City has a charter, but that charter is merely a pass-through of the powers granted to the City under the Home Rule City Act. Therefore, one may characterize Plaintiffs' position as relying on the notion that NREPA, in essence, pre-empts the Home Rule City Act. This simply is not the case. This Court has recognized that a State statute may "provide coextensive statutory rights" which simply widen the implementation rights of those entities to which the statute applies. *Burt Twp v Dep't of Natural Resources*, 459 Mich. 659, 670; 557 NW2d 289, 300 (1999). If the Hunting Area Control provisions of NREPA were intended to grant exclusive control to the Department of Natural Resources, the Legislature would have included language to that effect. *See id.* at 669; *see also Pittsfield Charter Twp. v. Washtenaw County*, 468 Mich. 702, 709-10 ; 664 NW2d 193; 197 (2003).

B. Because the ordinances regulating the discharge of firearms and other weapons are police power ordinances relating to the health, safety, and general welfare of citizens within the City, they are separate and distinct from hunting regulations.

The instant case presents a matter of first impression for this Court. However, as this Court is aware, the Court of Appeals dealt with a similar fact pattern in *Michigan United Conservation Clubs v City of Cadillac*, 51 Mich App 299; 214 NW2d 736 (1974). Amicus curiae will avoid duplicating the argument of the Defendants and will merely state the position that the *MUCC* court's ruling that a city's weapon discharge ordinance is separate and distinct from state hunting laws fits squarely within amicus curiae's conception of home rule power, police power and pre-emption. That is, the *MUCC* court recognized and gave deference to the City of Cadillac's home rule and police powers. The *MUCC* court recognized that even if one "[a]ccept[s] the general proposition that the legislature has pre-empted the field of hunting

regulation . . . it would seem rather obvious that the separate and distinct subject of firearm control would be a matter of local interest and a proper subject of local police power.” *Id.* at 301. Recognizing that this court is not bound by *MUCC*, amicus curiae respectfully requests that Court to adopt the *MUCC* court’s logic, which lead that court to the conclusion that home rule and police powers are sufficiently compelling as to render the subject of firearm and weapon discharge (a subject within the scope of city home rule and police power) distinct from hunting (a subject outside the scope of city home rule and police power).

II THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT THE CITY OF SAGINAW ORDINANCES, BY REGULATING THE DISCHARGE OF FIREARMS, ARE A PROPER EXERCISE OF THE CITY’S POLICE POWERS

Common sense dictates that regulating the use of weapons is within the scope of a city’s power to enact ordinances for the protection of public health, safety and general welfare. Michigan courts generally recognize firearm regulation as a matter of police power. *See People v Brown*, 253 Mich 537, 540-41; 235 NW 245 (1931); *Bay Co Concealed Weapons Licensing Bd v Gasta*, 96 Mich App 784, 788; 293 NW2d 707 (1980). More specifically, the Michigan Court of Appeals recently found that a city may regulate the discharge of a firearm within its corporate boundaries. *Michigan Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 662 N.W.2d 864 (2003).¹ The *Ferndale* court pointed out that a statute prohibiting local governments from enacting ordinances regulating "ownership, registration, purchase, sale, transfer, transportation, or possession" of firearms also contained express language that the statute itself "does not prohibit a city or a charter township from prohibiting the discharge of a pistol or other firearm within the jurisdiction of [a] city or charter township." *Id.* at 414; *see also*

¹ In the *Ferndale* case, the Court of Appeals held that the City of Ferndale’s ordinance creating “gun-free zones” was invalid, as it was expressly pre-empted by statute owing to the breadth of the ordinance. *Ferndale, supra*, at 410 (quoting MCL 123.1102).

MCL 123.1102, .1104. Though the *Ferndale* court invalidated a particular firearms ordinance, the fact that it distinguished firearms *discharge* from the various other aspects of gun control—ownership, regulation, sale, possession, etc.—highlights the distinct position that the issue of firearms discharge occupies within the realm of municipal police powers.


No other matter of local government regulation has a greater connection to public safety as the discharge of weapons. Certainly, their regulation remains a matter of local police power, though such power is not absolute and must be exercised in a manner that comports with state law restrictions. See 7A McQuillin, *supra*, § 24.489. However, Michigan jurisprudence recognizes that the Legislature has endowed cities with broad powers to determine, through their charters, the manifestation of police power and that state law restrictions on such power must be express. In the instant case, the Legislature has simply provided cities with an alternative means of controlling firearms, which co-exists with cities' legal authority to regulate the discharge of firearms.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing arguments and authorities, the amicus curiae Michigan Municipal League respectfully requests that this Court affirm the Court of Appeals' decision.

Respectfully submitted,

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PROOF OF SERVICE

JUDITH A. TRAN, being first duly sworn, deposes and states that on November 30, 2006, she caused to be served two copies of the following:

- Brief of Amicus Curiae Michigan Municipal League in Support of Defendants-Appellants, City of Saginaw and Deborah Kimble, City Manager

upon counsel of record, at the below addresses:

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via **FIRST CLASS MAIL.**



JUDITH A. TRAN